89-263

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

August Term, 1989

MILTON A. CALESNICK &
ELEANOR J. CALESNICK, H/W
Appellants

vs.

REDEVELOPMENT AUTHORITY OF
THE CITY OF PHILADELPHIA
and
SUPERIOR COURT OF PENNSYLVANIA
Appellees

Petition for a Writ of Certiorari to The United States Court of Appeals for the Third Circuit

MILTON A. CALESNICK &
ELEANOR J. CALESNICK
Pro Se Appellants

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QUESTIONS PRESENTED

1. Whether the untimely entry of the Federal District Court's final Judgment was in error whereby it effected an erroneous termination of the Appellants' ongoing discovery process; and, where the presiding judge had interrupted and withheld his ruling to initiate the discovery process by stating: "before I rule, you [Counselor for the Appellee] will supply me with a certified copy of that order [early C.C.P. Order] since there may be some doubt as to its authenticity"; and, where the final order of the Court never included the determination of authenticity which it had requested, and upon which the destiny of the law suit was fully dependant.

2. Whether preclusion of the law suit by the Federal District Court upon the doctrine of res judicata was in error wherein the

issues presented were not identical to those of prior Federal law suits; and where, in addition, the merit content of the issues in the prior cases had not been adjudicated and made part of the final judgment - being a necessary requirement for preclusion.

3. Whether granting a Motion For Injunction under the All Writs Act was appropriate upon the District Court's erroneous determination that "the same claims in the instant complaint had been presented to the court" in prior litigation.

THE PARTIES

The Appellants are Milton A. Calesnick and his wife Eleanor J. Calesnick citizens of Montgomery County, Pennsylvania. The Appellee-Respondents are the Redevelopment Authority of the City of Philadelphia and the Superior Court of Pennsylvania.

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FEDERAL QUESTION

Rights of Citizens: Fourteenth Article of Amendments to the Constitution of the United States provides, in pertinent part: ". .nor shall any State deprive any person

of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

12 U.S.C. § 1701

28 U.S.C. § 1291

28 U.S.C. § 1292

28 U.S.C. § 1257(3)

OTHER AUTHORITIES

United States Constitution: Article III, Section 2, Clause 1 - Judicial Power of Our Courts.

United States v. Reynolds, 1953, 73 S. Ct. 528, 345 U.S. 1, L.Ed. 727, 32 A.L.R. 2d 382.

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Petition for a Writ of Certiorari to The United States Court of Appeals for the Third Circuit

Appellants respectfully submit the Petition for a Writ of Certiorari to demonstrate that the Supreme Court of the United States has jurisdiction, and that the federal question is substantial. Appellants pray that the final decision of the Federal District Court and the United States Court

of Appeal for the Third Circuit be overturned not only because of inherent errors, but more importantly because of the extreme and unjustified harm the decision caused. The damages represent the life-savings of these Appellants which effectively altered the lives of their family.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, entered April 4, 1989 (Appendix A) is an affirmation of the District Court Order and was without comment; the Order of the Court of Appeals for the Third Circuit on the Petition For Rehearing (Appendix B) denied the Petition and was also without comment - entered on May 3, 1989.

JURISDICTION

Milton A. Calesnick and his wife Eleanor J. Calesnick appeal from the judgment of the United States Court of Appeals for the Third Circuit submitted on March 10, 1989 and denied April 4, 1989 (Appendix A). A Petition For Rehearing was filed on April 4, 1989 and denied on May 3, 1989 (Appendix B). The Supreme Court of the United States has jurisdiction to review the decision of the Third Circuit by writ of certiorari under 28 U.S.C. § 1257(3).

The Supreme Court of the United States maintains judicial power, extended by the Constitution and the Congress, to review judgments of Federal District Courts under 28 U.S.C. § 1291 in actions which arise under an Act of Congress, i.e. 12 U.S.C. § 1701, et seq. (National Housing Act of June 27, 1934) parent law under which the Urban

Redevelopment Law of the Commonwealth of Pennsylvania was created (35 P.S. § 1701 et seq.); and, where violations of Fourteenth Constitutional Amendment Rights of Procedural Due Process and Equal Protection of the Laws are claimed - as herein. Judicial power is vested by Article III, Section 2, Clause 1 of the United States Constitution, and extends to all "cases & controversies" and established for the protection and enforcement of rights, prevention, redress or punishment of wrongs.

Jurisdictional law holds that a discovery-order controversy can be reviewed as part of an appeal from the final judgment: U.S. v. Reynolds, 1953, 73 S.Ct. 528, 345 U.S. 1, 97 L.Ed 727, 32 A.L.R. 2d 382. Additionally, the Federal District Court's Interlocutory Order (June 21, 1989) which

initated the discovery process, falls within this Court's jurisdiction and authority for review within the Interlocutory Appeal Statute, 28 U.S.C. § 1292.

STATEMENT OF THE CASE

Background of the Controversy

In 1965 Appellants purchased a poorly maintained antique house situated at 130 Delancey Street, Philadelphia, Pa. for total restoration in accordance with regulations of the Redevelopment Authority (RDA) of the City of Philadelphia. Similarly, these Appellants purchased an unimproved contiguous lot, in 1967, situated at 132 Delancey Street for development into a colonial garden. To accomplish these objectives, additional time was granted by the RDA - who had control over the development project area - with no final

or otherwise fixed date for completion of the project.

In 1970 the RDA instituted 2 law suits against these Appellants: Court of Common Pleas, Philadelphia County, September Term, 1970, No. 4483 & No. 4484 (one for each parcel of real estate) seeking Deed title to both properties on the charge that restorations had not been completed within the original one-year time period, despite having granted additional time. The demand for the properties was not within the terms of any agreement with the RDA, nor could such an inference of title transfer be ascertained from the terms of the agreement.

The 2 law suits were consolidated for trial and heard on merit before the Hon. Paul Ribner on June 15, 1972. Judge Ribner issued a Decree Nisi on February 28, 1973 which contained the following conclusion of

law:

> "The Redevelopment Authority of the City of Philadelphia waived the date originally set for completion of the restorations and the garden located at 130/132 Delancey Street, Philadelphia."

On October 18, 1974 - unknown to these Appellants at that time - the RDA, by their Counselor David S. Winston, maliciously, intentfully, and WITHOUT A COURT ORDER or other legal authority, criminally altered the official court dockets of both law suits by inscribing a false notation-entry to reflect that title to the subject-matter real estate were conveyed to the RDA by the Prothonotary of the Court. The notations are:

> July Term, 1970, No. 4483
>
> "Oct. 18, 1974: Prothonotary Americo V. Cortese - deed to Redevelopment Authority of the City of Philadelphia, 132 Delancey Street, Phila."
>
> July Term, 1970, No. 4484
>
> "Oct. 18, 1974: Prothonotary Americo V. Cortese - deed to Redevelopment

Authority of Phila., Premises 130 Delancey St., Phila."

NOTE: Direct access to the dockets was part of the standard procedure at that time, thus permitting tampering.

Based upon their fraudulent claim of property ownership, the RDA padlocked the properties, seized antique building material and construction equipment located on the properties belonging to these Appellants.

On March 5, 1979, in an effort to resolve all outstanding litigation, the RDA negotiated an agreement with these Appellants in which the RDA contributed Deeds to the two said parcels of real estate which they "owned". These Deeds were to be held by the Court of Common Pleas until these Appellants completed the restorations within a specific period of time; failure on the part of these Appellants would revert the Deeds back to the

RDA. In addition, all building material and equipment was to be returned, since they were necessary for further restorations in compliance with the agreement.

After the agreement was signed and it became effective, it was learned that the RDA could not return the building materials and construction equipment; consequently, these Appellants were unable to complete the project on time. Thereupon, the RDA, who were unconcerned with their failure to return the building materials and equipment, sought to enforce the terms of the agreement.

At this time, the fraudulent docket entries made by the RDA were exposed - coincidently. It became apparent that the RDA's contribution to the agreement of Deeds to the real estate was fraudulent, since the Deeds were NEVER in possession of the RDA. Immediately, the Court of Common Pleas was

petitioned to rescind and make void the agreement of March 5, 1979. Despite the efforts of these Appellants, on December 9, 1980, Judge Eugene H. Clarke, Jr. (Court of Common Pleas) issued an order which enforced the provisions and terms of the fraudulent agreement irrespective of proof that (1) the docket entries were fraudulent; (2) the said agreement was voidable since it contained a fraudulent contribution by the RDA; (3) the RDA failed to return both building materials and equipment to these Appellants for the fulfillment of their part of the agreement. A timely appeal to the Superior Court of Pennsylvania followed.

By its Memorandum Opinion (Appendix C) it is clear that the Superior Court understood the issues and greviences caused by the fraud of the RDA against these Appellants. However, instead of reviewing the frauds with which the

RDA was charged, the Superior Court CREATED A FRAUD of its own which it reviewed concerning litigants who were neither parties to nor litigants in the action - and, over whom the Court HAD NO JURISDICTION!

The entire content of the Superior Court's Memorandum & Judgment, including the elements which were utilized to create the Court's own fraud, were taken directly - almost word for word - from the Brief of the RDA submitted to the Superior Court. Utilization of a litigant's allegations of fact instead of the preserved records is a direct violation of the Superior Court's own ruling for court procedure.

This bizarre behaviour of the Superior Court of Pennsylvania violated these Appellant's Fourteenth Amendment Rights of Procedural Due Process & Equal Protection of the Laws based upon two distinctly separate

causes of abusive action.

(1) Failure of the Superior Court to review errors assigned to the Court of Common Pleas, wherein that court refused their obligation to rescind an agreement in which fraud committed by the RDA was incorporated.

(2) The issuance of a Judgment & Memorandum Opinion composed with an extrinsic fraud created by the Superior Court itself; and, the Judgment of which was against individuals who were neither parties nor litigants, and over whom the Superior Court had NO JURISDICTION whatsoever.

Prior Federal Law Suits

In 1985 these Appellants instituted two law suits in the Federal District Court for the Eastern District of Pennsylvania: (1) Calesnick v. Commonwealth of Pennsylvania & Redevelopment Authority of the City of

Philadelphia, Civil Action, No. 83-0498, 810 F.2d 1162 (3rd Cir. 1987) upon the foundation that the Superior Court of Pennsylvania failed to review the errors assigned to the Court of Common Pleas of Philadelphia County for not rescinding the agreement of March 5, 1979; (2) Calesnick v. Commonwealth of Pennsylvania, Superior Court of Pennsylvania and the Supreme Court of Pennsylvania, Civil Action, No. 85-1381, which was founded upon the frauds of the RDA. The District Court ruled upon both cases simultaneously and dismissed both law suits solely upon the basis that the frauds alleged to the RDA were ruled upon by the Superior Court (affirmed by the Supreme Court of Pennsylvania) as being "absurd", despite these Appellants' unquestionable display of proof that the "absurd" ruling was NOT upon the fraud of the RDA, but upon the "fraud" which was CREATED by the Superior Court - and which never existed.

Statement of the Instant Case

In 1988 these Appellants instituted the instant law suit: Calesnick v. Superior Court of Pennsylvania & Redevelopment Authority of the City of Philadelphia, Civil Action, No. 88-1448 which is a COLLATERAL ATTACK upon the Judgment & Memorandum Opinion of the Superior Court since it is constructed upon a fraud created by the Superior Court itself. The focus of this action is upon having the Judgment & Memorandum Opinion of the Superior Court ruled void, having no legal standing and commanding effect.

Proceedings in the Courts Below on the Instant Case

The case proceeded only through the discovery and pleadings stages. The Court ruled (Appendix D) that "precisely the same allegations were set forth by plaintiffs in

previous actions in this Court against the Redevelopment Authority as well as other defendants", whereby the Superior Court's Motion to Dismiss and the RDA's Motion For Summary Judgment were granted on May 17 and May 18, 1988.

By Order of May 24, 1988 the above two Orders were vacated to provide a hearing on the RDA's Motion For Injunction & Sanctions under Rule 11. An evidentiary hearing was held on June 21, 1988 at which time Counselor for the RDA presented the Court with copies of various complaints & briefs of prior actions to justify his Motion For Injunction. Appellants Milton A. Calesnick was requested to identify and authenticate each document presented. The Appellant could not verify the authenticity of one particular document: Amended Order of October 10, 1974. In response thereto, the Court (Judge Thomas N.

O'Neill, Jr. presiding) made the following order:

> "You [Counselor Rifkin] will supply me before I rule, with a certified copy of that order since Mr. Calesnick feels that there may be some doubt as to its authenticity. Therefore, I will require a certified copy."

Subsequently, on July 22, 1988 Counselor Rifkin delivered a letter to Judge O'Neill which stated that the Amended Order of Oct. 10, 1974 could NOT be certified. The RDA's failure to produce a certified copy of the Amended Order initiated action by these Appellants to continue the discovery process by requesting the production of Deeds and Answers to interrogatories to the real properties situated at 130/132 Delancey Street, Philadelphia, Pa. The Amended Order in question directed the Prothonotary of the Court of Common Pleas to convey the parcels of real estate to the RDA from these Appellants; and, the dockets of the Court of Common

Pleas indicate that the conveyances were made on October 18, 1974. The discovery would have verified whether the Amended Order was authentic or would have proven it to have been fraudulently created by the RDA.

Until this time, no justice ever examined and questioned the authenticity of the Amended Order of October 10, 1974. These Appellants, accordingly, requested the RDA to produce the said Deeds and answers to interrogatories under appropriate Rules of Civil Procedure. Copies of all requests for discovery and letters pertaining thereto were delivered to Judge O'Neill so that the Court would be aware of the discovery process at all times. As expected, the RDA filed objections to every effort at discovery, stating:

> "These requests for production of documents are not relevant to the

> issues presently before the Court and are not reasonably calculated to lead to the discovery of relevant information."

In addition, the RDA Defendant filed a Motion For Protective Order which failed to display any acceptable reason - such as annoyance, oppression, embarrassment, or undue burden or expense.

Despite the clear logic for the production of the Deeds and answers to related interrogatories, on September 28, 1988 the District Court issued an Order which effectively terminated the discovery process, whereby the Court never determined whether the Amended Order was authentic or fraudulent. The Court had specifically expressed a need for this knowledge when the Court said: "before I rule, .. I will require a certified copy .. since Mr. Calesnick feels that

there may be some doubt as to its authenticity".

The Order of September 28, 1988 also granted the RDA's Motion For Injunction under the All Writs Act.

ARGUMENT

This Appeal to our Supreme Court of the United States is a request to overturn the decision of the United States District Court not only because it was wrong, but more importantly because of the extensive harm the decision created in the lives of these Appellants; and, overturning the decision would clearly be essential to remedy the severe damages which accompanied the injury. The damages include the loss of these Appellants' life savings.

The errors in the Court's decision are evident from the facts presented; but, the severe damages sustained must be recited. The RDA took possession of these Appellants' two parcels of real estate and sold them for $287,000.00 which they kept; in addition, the RDA seized and destroyed personal property (antique house parts, building mater-

ials, equipment - including a front-end loader all valued at approximately $50,000.00 - a total loss of approximately $337,000.00.

ARGUMENT

Part I

The discovery of facts by a trial court is basic for the determination of a fair judgment; and, the sole issue in this part of the Appeal is whether the District Court erred in NOT requiring the RDA Defendant to produce documents and answers to interrogatories propounded by these Appellants, where the presiding jurist himself interrupted his ruling to initiate the discovery process by demanding that the RDA Defendant produce a certified copy of the Amended Order of Oct. 10, 1974 - the authenticity of which was questionable.

At the hearing on June 21, 1988, when

Appellant questioned the authenticity of the Amended Order of Oct. 10, 1974, Judge O'Neill made the following order:

> "You [Counselor Rifkin - for RDA] will supply me, before I rule, with a certified copy of that order since Mr. Calesnick feels that there may be some doubt as to its authenticity. Therefore I will require a certified copy."

Subsequently, on June 22, 1988, Counselor Rifkin delivered a letter to Judge O'Neill stating that the Amended Order could NOT be certified. Thereupon, as a natural course, these Appellants continued discovery.

The thrust of these Appellants' discovery was for the production of the Deeds by the RDA to the two parcels of real estate alleged to have been conveyed to the RDA on October 18, 1974. <u>These Deeds would have verified that the Amended Order had existed</u> since the alleged conveyance was so directed by the said Order. These Deeds are public documents which would have been recorded by the Recorder

of Deeds (Philadelphia County) if they had existed. Investigation disclosed that the RDA DID NOT record Deeds to the real Properties situated at 130/132 Delancey Street at any time in 1974. Therefore, the request for the production of these Deeds was reasonable - if they existed. The RDA took the position that the Deeds were not relevant to the issues of the case - which is in contradiction to the opinion of Judge O'Neill since Judge O'Neill interrupted his ruling and awaited the certification of the Amended Order, which, alternatively, could have been verified by production of the said Deeds.

Despite the clear showing that the records of the Recorder of Deeds shows that the Deeds do not exist and that no transfer of these properties took place in 1974, and that the RDA made every effort to conceal this information from the Court, the District Court's

Order of September 28, 1988 erroneously terminated this crucial discovery process. The RDA should have either produced the Deeds or have admitted that they never existed; and, the behaviour of the RDA is suspect. FRAUD BY THE RDA IS THE HEART OF THE LAW SUIT.

Prior to the hearing on June 22, 1988 Judge O'Neill was fully aware of the Appellants' charges of frauds against the RDA by the Complaint and with additional documents in subsequent briefs. The frauds perpetrated by the RDA included: (a) drafting of the fraudulent Amended Order of October 10, 1974; (b) fraudulent entry (tampering) into the court dockets which falsely reflect that the 2 parcels of real estate belonging to these Appellants had been conveyed to the RDA on October 18, 1974; (c) by seizing and padlocking the real properties and maintaining possession for more than 5

years; (d) seizing and destroying personal property - building material and equipment.

The Exordium of the Complaint states:

> "This law suit seeks the enforcement of Constitutional Rights as well as remedy for the injury suffered by the Plaintiffs which developed as a direct result of the intentional, malicious, and intrinsic fraud specifically designed with cunning and deception, executed by the Redevelopment Authority of the City of Philadelphia, during ongoing litigation, to unlawfully take possession of very valuable real estate belonging to these Plaintiffs; and, the fraudulent and criminal act was perpetrated by the Redevelopment Authority under the cloak of vested authority by virtue of State Law. The fraud was later incorporated by the Redevelopment Authority into an Agreement with these Plaintiffs."

NOW, AT LAST, it appeared that Judge O'Neill, by requesting certification of the Amended Order of Oct. 10, 1974, was about to expose the fraudulent activities of the RDA; and, the law suit would have terminated in favour of these Appellants, since the basis of the case was the issue of fraud by the

RDA. Although the interlocutory order of the Court was unfulfilled, and the Court had not received that crucial information which was requested from the RDA by Judge O'Neill, on September 28, 1988 the District Court entered its final order - without comment - and erroneously terminated the ongoing discovery process.

Considering that the only document the RDA was requested to produce was a Deed to real estate which the RDA claimed it owned; and, also considering that no limitations, restrictions, nor objections to the discovery process had been issued by the Court (or had been requested by the RDA); and, since Judge O'Neill had offered NO EXPLANATION for the untimely entry of his final order, this Honorable Court should find sufficient reason to overturn the error created by the District Court and allow

these Appellants to continue their discovery process since their Right to Procedural Due Process & Equal Protection of the Laws is a Constitutional Guarantee within the Fourteenth Amendment to the United States Constitution.

Since the District Court itself had put aside it's ruling and awaited the production of certification of the Amended Order of Oct. 10, 1974, there can be no doubt as to whether the document sought to be authenticated was important and relevant to the issues of the law suit, or whether discovery was reasonably calculated to lead to information necessary for the Court's decision. These determinations of relevancy and importance had been decided by Judge O'Neill; and, all arguments to the contrary by the RDA Defendant must be considered futile. The importance of this discoverable information is obvious and

would settle the long dispute between the parties for all time.

One of the most serious charges in a civil action is the charge of FRAUD, particularly when the accusation is made against a governmental agency; and, it is the Appellants' sincere belief that - in the case at hand - wherein the pinnacle of litigation had been reached by the production of one document - DEED TO REAL ESTATE - it was incumbent upon the Court to determine the validity of the charge of fraud by allowing and/or insisting that the Deed be produced. In consideration of duty to protect Constitutional Rights of Procedural Due Process, and with the logic inherent in our justice system, Judge O'Neill was obliged to preserve these Appellants' Rights - not necessarily because these Appellants were correct, but more importantly because of the tremendous

harm which resulted from the erroneous curtailment of their right to discovery. The harm created was the loss of the Appellants' life savings!

Jurisdictional Determinations

The Standard For Review is that granting, denying and/or interference to terminate ongoing discovery is a matter within the District Court's discretion; however, the Court's discretion will be reversed only if the action of the Court is ruled to be improvident, affecting the party's rights, and results is substantial harm. In this respect the Court may find the decision in Edgar v. Fimley, C.A., 312 F.2d 533 most instructive. Here the District Court Judgment was reversed because the Court had erroneously sustained objections to interrogatories which would have developed very

important information which might have reasonably overturned the ruling of the court.

In the matter of Roebling v. Anderson, 103 U.S. App. D.C., 237, 257 F.2d 615, 619 (1958) it was determined that the District Court erred in denying the motion to produce essential and relevant documents under Rule 34 since these documents were in the Defendant's possession. The documents were records kept in the ordinary course of the defendant's business, and disclosure would not have been prejudicial to the defendant.

The Court may find the matter of Bell v. Swift & Co. (283 F.2d 407, 1960) parallel to the instant case. Here the Court of Appeals for the Fifth Circuit decided that although the District Court erred in refusing to require the Defendant-Appellee to answer interrogatories, the Court's error raised

only academic questions bearing on a fair and orderly system of justice; however, the appellant had not shown that he was hurt by the error of the court. In the matter at hand, the damage to these Appellants is their life savings - $337,000.00.

In the criminal action of United States v. Agurs, 427 U.S. 97, the prosecutor failed to volunteer exculpatory material, and this Court stated: "The proper standard of materiality of undisclosed evidence is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed."

In the matter of Morris Stulsaft Foundation v. Superior Court, 54 Cal. Rptr. 12, the Court's decision was founded upon the theory that: "Where discovery is sought of non-privileged matter which is directly relevant to issues before the court, there is no room

for the exercise of court's discretion, since the party seeking to discover is entitled to it as a matter of right."

ARGUMENT

Part II

The District Court, by its Opinion & Memorandum, granted the Defendants' Motion To Dismiss & Motion For Summary Judgment upon the erroneous assumption of Judge O'neill that the issues and claims in the instant law suit were identical to those of the 2 prior Federal District Court actions. To wit:

> "Precisely the same allegations were set forth by plaintiffs in previous actions in this Court against the Redevelopment Authority and the Superior Court as well as other defendants."
>
> "Since plaintiffs' claims have been the subject of the final adjudication by Judge Pollak, the doctrine of Res Judicata bars this action. (Appendix D)

The two prior Federal District Court cases

and the instant case have totally dissimilar issues and claims, so the Doctrines of Res Judicata and Collateral Estoppel are not applicable.

Prior Federal Law Suits Compared With The Instant Law Suit

Both prior law suits were filed with the Federal District Court for the Eastern District of Pennsylvania: Calesnick v. Commonwealth of Pennsylvania & Redevelopment Authority of the City of Philadelphia, C.A., No. 83-0498; and Calesnick v. Commonwealth of Pennsylvania, Superior Court of Pennsylvania & Supreme Court of Pennsylvania, C.A., No. 85-1381.

In case No. 83-0498 the issue & claim were that the Superior Court FAILED to review errors assigned to the Court of Common Pleas of Philadelphia County.

In case No. 85-1381 the issue & claims were founded upon the frauds perpetrated by the Redevelopment Authority.

The instant matter is a COLLATERAL ATTACK upon the Judgment & Memorandum Opinion of the Superior Court of Pennsylvania, since the Court's opinion contained an extrinsic fraud created by the Superior Court itself. (Appendix C)

The two prior actions were heard by the Honorable Louis H. Pollak simultaneously, and both cases were dismissed on the basis that the fraud assigned to the RDA had been ruled upon by the Superior Court as "absurd". Judge Pollak's ruling was made despite the fact that the Superior Court's Memorandum Opinion clearly displayed that the Superior Court did not review the frauds perpetrated by the RDA, but, instead, reviewed a 'fraud' against individuals (the Court, Prothonotary,

and Bar Association) who were neither party nor litigant to the action, and over whom the Superior Court HAD NO JURISDICTION, and against whom these Appellants' had never made charges.

Judge Pollak erred in having accepted the Judgment of the Superior Court without imput of his own, and compounding the error, by utilizing the ruling of "absurd" as though it referred to the frauds committed by the RDA - and, it was on this basis that the law suit was dismissed.

The only similarity between all three Federal District Court cases is that the RDA and the Courts of Pennsylvania appear as the Defendants and the Calesnicks as Plaintiffs. Each action is composed of separate and very distinct causes of action and issues.

Judge O'Neill, in His Honor's Opinion, dismissed the instant Complaint upon the

basis that the identical issues had been ruled upon by Judge Pollak in the prior action; and, since Judge Pollak dismissed the case on the basis of Collateral Estoppel, Judge O'Neill perceived no reasons to rule otherwise. Had Judge O'Neill made an independent investigation of the legal history, His Honor would have realized that the Judgment of the Superior Court was legally sterile and voidable with no commanding affect upon subsequent proceedings; and that the Judgment & Memorandum Opinion of Judge Pollak INHERITED the constructed and extrinsic fraud developed by the Superior Court.

Judge Pollak's Comments on the Prior Cases

There can be no better authority on the issue in the prior action before Judge Pollak than Judge Pollak himself who stated in His Honor's Opinion of June 18, 1985:

> "Plaintiffs assert that they do not attack the validity of the state court order but to correct the state court's failure to properly review each of the issues raised in plaintiffs' appeal to the Superior Court."

Indeed, Judge Pollak's statement is well corroborated by the Exordium of these Appellants' prior Complaint (No. 83-0498):

> "The Complaint does not find fault with any substantive laws or Rules of Court; it is directed solely against the arbitrary and unreasonable procedural practice of ignoring issues presented and accepted for appeallate review."

In contradistinction, the instant Complainst is a specific and deliberate COLLATERAL ATTACK against the Superior Court's Judgment and Memorandum Opinion of July 22, 1983 in which the RDA Defendant was SUBSTITUTED, and

thereby their frauds were never adjudicated. Since the RDA and their frauds were never adjudicated, they remain a viable defendant to the charges of fraud; and, the possibility of Res Judicata and Collateral Estoppel are non-existent.

Conditions Necessary for the Application of Collateral Estoppel

Collateral estoppel demands that all of the following requirements must be met:

1. issues in the instant case and the prior case be identical;
2. that there be a final judgment on the MERIT of the prior issues;
3. parties in both actions are identical, or in privity with either;
4. issues in the prior action be fully litigated;
5. that the issue be essential to the judgment in the prior action.

The doctrine of Collateral Estoppel is not applicable to the instant case for the following reasons:

1. The issue in the prior action was, as Judge Pollak announced: "failure to review issues raised in their appeal". Since the instant suit is a collateral attack, obviously the issues are totally dissimilar;
2. Since the actual frauds of the RDA were substituted by the Superior Court itself, most certainly the issues were never adjudicated on merit;
3. Since the issue of the RDA's frauds were removed from the case and substituted, the issues could not have been "fully litigated" and made "essential to the judgment in the prior action".

Jurisdictional Holdings

Jurisdictional law holds that in a sub-

sequent proceeding under a different cause of action - as herein, the doctrine of Res Judicata and Collateral Estoppel do not apply to issues raised in the prior action but which were NOT PASSED ON and decided by the court. In Nashus & L.R. Corp. v. Boston & L.R. Corp., 164 Mass 222, 41 NE 268, the court determined:

> "A demand or claim is not res judicata, though it was interposed in a prior action along with other claims, if the final judgment of the court appeared to be upon the other claims and there is no evidence that the claim was in fact argued, considered, or determined by the court."

This determination for the necessity of the issue to be adjudicated and made essential to the final judgment for the application of res judicata and collateral estoppel was further substantiated in the following cases: Washington, A. & G. Steam Packet Co. v. Sickles (US) 5 Wall 580, 18 L.Ed 550; Williams v. Patterson, 230 Miss 865, 34 S.2d 366;

Harvey v. Getchell, 190 Or 205, 225 P.2d 391; Hunter v. Hunter, 63 SC 78, 41 SE 33; Gronseth v. Brubakken, 56 SD 230, 228 NW 189; Purcellville v. Potts, 179 Va 514, 19 SE 2d. 700, 141 ALR 633.

The following two jurisdictional determinations are most instructive. In Smith v. Smith, 235 Minn 412, NW 2d 276, 32 ALR 2d 1135, the court determined that "the doctrine of res judicata & collateral estoppel DO NOT PRECLUDE relitigation of an issue raised by the pleadings in the former action, but withdrawn from consideration of the court either by stipulation of the parties or otherwise". In Todaro v. Gardner, 3 Utah 2d 404, 285 P.2d 839 the court noted: "A judgment is NOT res judicata as to matter which a court DELIBERATELY and EXPRESSLY REFUSED to determine".

ARGUMENT

Part III

As a final act in the Court's Memorandum, the Motion For Injunctive Relief was granted upon the erroneous belief that the same issues were relitigated by these Appellants in the various actions brought before the Court. As shown previously, the issues and claims in each action and the thrust of each case was different, although the same adversaries were involved each time. The purpose of the Appellants was to expose fraud and to seek justice; and most certainly, harassment, annoyance, and frivolousness were not the aims, nor was there any intent to burden the courts. The devious means by which the RDA was able to circumvent justice in the courts, and conceal incriminating evidence of fraud by evasive techniques created frustration and fomented the strong desire to liberate

the truth and to defend the system of justice under which we survive.

Granting injunctive relief was erroneous and without justification, rewarded the culprit and further burdened the victim.

CONCLUSION

For all of the foregoing reasons, the Appellants believe that the questions presented by this Petition are substantial, particularly since fundamental Constitutional Right of Due Process has been violated. In consideration that the effects of the decisions of the Courts Below have been so devastating for this family, the Appellants respectfully urge this Honorable Court to give this case its full consideration and to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Milton A. Calesnick

MILTON A. CALESNICK,
Appellant

Eleanor J. Calesnick

ELEANOR J. CALESNICK,
Appellant

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 88-1834

On Appeal From The United States

District Court For The Eastern

District Of Pennsylvania

Submitted March 10, 1989

Circuit Judges

STAPLETON, GREENBERG and SCIRICA

Judgment Order

"After consideration of the Contentions raised by appellants, it is ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed, Costs taxed against appellants."

By the Court

Circuit Judge

Clerk

Dated: Apr. 4, 1989

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 88-1834

On Appeal From The United States

District Court For The Eastern

District Of Pennsylvania

SUR PETITION FOR REHEARING

Circuit Judges

STAPLETON, GREENBERG and SCIRICA

ORDER

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the court

Circuit Judge

Dated: May 3, 2989

APPENDIX "C"

IN THE SUPERIOR COURT

OF PENNSYLVANIA

NO. 367 Phila. 1981

Appeal From The Order Of

December 9, 1980 In The

Court Of Common Pleas Of Philadelphia

County, Civil at No. 1713

September Term, 1976

Before:

WICKERSHAM, ROWLEY and WATKINS, JJ.

MEMORANDUM OPINION:

"In this case the appellants, in their pro se brief, appeal from an order of the court below which refused to rescind an agreement between the appellants and the Redevelopment Authority of the City of Philadelphia. The appellants allege that the agreement was "constructed upon fraudulent foundations, and is voidable, as a matter of law".

On December 9, 1980, the court below

entered an order which enforced a prior order of the court by directing that a deed to the premises at 130-132 Delancey Street, Philadelphia be delivered to the Redevelopment Authority of Philadelphia and filed of record.

* * *

In their appeal, the appellants allege fraud on the part of the courts, the Bar Association and the Prothonotary. A review of the record demonstrates that such claims are absurd. The Redevelopment Authority properly filed its motion to enforce the previous order when appellants failed to meet their obligations under the aforesaid Consent Order."

APPENDIX "D"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

NO. 88-1448

MEMORANDUM:

O'Neill, J. September 28, 1988

In this action, plaintiffs, appearing pro se, assert that they have been wrongfully deprived by defendant Redevelopment Authority of title to a house and lot located at 130-132 Delancey Street, Philadelphia, and of certain building materials and construction equipment which were located at that address. They also contend that defendant Superior Court of Pennsylvania failed to review adequately and properly the issues presented in an appeal of an earlier state court proceeding involving the same properties to which they and the Authority were parties. Defendants' actions are alleged to constitute a violation of the due process and equal protection clauses of the

Fourteenth Amendment.

Precisely the same allegations were set forth by plaintiffs in previous actions in this Court against the Redevelopment Authority and the Superior Court as well as other defendants.

* * *

In his exhaustive (57 pages) opinion in the Redevelopment Authority case, my colleague Judge Pollak concluded that all of plaintiffs' claims were barred by final judgments adverse to plaintiffs rendered in various actions in the Pennsylvania courts in the years 1970 to 1984. Reference is made to his opinion for a description of the state court litigation. In the Commonwealth of Pennsylvania action, which attacked the state court judgment, Judge Pollak held that the alleged conduct of the Superior Court did not violate rights protected by the U.S. Constitution.

Since plaintiffs claims have been the subject of final adjudication by Judge Pollak, the doctrine of res judicata bars this action. I turn now to defendants' motion for an injunction under the All Writs Act and the Authority's motion under Rule 11.

* * *

O'Neill, J.